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No. 82-1075

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CPG PRODUCTS CORP. AND GENERAL MILLS
FUN GROUP, INC.,

Petitioners,

v.

ANTI-MONOPOLY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS AS AMICUS CURIAE IN
SUPPORT OF PETITIONER**

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MOTION OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS FOR LEAVE TO FILE BRIEF
AS *AMICUS CURIAE*

The National Association of Manufacturers (hereinafter "NAM"), by and through its attorneys, hereby moves this Court pursuant to Rule 36 of the Rules of the Supreme Court for leave to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The NAM has received consent from petitioners, but respondent, through its counsel, has refused consent.

The National Association of Manufacturers is a non-profit voluntary business association incorporated under the laws of the State of New York representing more than 12,000 manufacturing and related business concerns which in the aggregate account for an estimated 85 percent of all manufacturing employees and 80 percent of

the nation's industrial output. In addition, through its Associations Department and the National Industrial Council, NAM is affiliated with approximately 158,000 businesses, many of whom share our vital interest in an effective and efficient trademark protection system in the United States.

The fundamental problem arising from the ruling of the Ninth Circuit Court of Appeals in the instant case is that it creates uncertainty and inconsistency in the approach taken by our federal courts in determining whether the name of a product is generic or actually a legitimate, recognizable, and legally protectable trademark. This issue has ramifications across the entire range of manufacturing industries, since the Ninth Circuit's opinion by its own admission calls into question virtually any trademark. We believe that the decision and its underlying rationale, if unreviewed by this Court, will do extensive damage to the validity and enforceability of many of the trademarks held by NAM's members and will seriously impair our members' ability to protect the substantial goodwill symbolized by those trademarks.

We urge that we be granted leave to file our brief as *amicus curiae* to highlight the important effect of these issues on American industry.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS AS AMICUS CURIAE IN
SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers (NAM) hereby submits this brief as *amicus curiae* in support of the petition for certiorari to the United States Court of Appeals for the Ninth Circuit. Our interest is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF THE CASE

Respondent, Anti-Monopoly, Inc., sought a declaratory judgment that the trademark MONOPOLY is invalid and not infringed by respondent's use of the mark ANTI-MONOPOLY for a board game. Twice the district court ruled that the trademark MONOPOLY was valid,¹ and

¹ *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 195 U.S.P.Q. 634 (N.D. Cal. 1977); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 515 F. Supp. 448 (N.D. Cal. 1981).

twice the Ninth Circuit reversed, relying extensively on the propriety of certain survey evidence, rejecting other survey evidence, and formulating a new rule of law that will make trademark rights dependent upon whether or not the public can identify by name the particular producer of the product on which the mark appears.² The questions presented to this Court are (1) whether a trademark is generic solely because a majority of purchasers buy the product because of a desire to have that product and not because of loyalty to its producer, and (2) whether a court of appeals may substitute its view of the evidence for that of the trial court under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.

SUMMARY OF THE ARGUMENT

The Ninth Circuit decision is in direct conflict with the legal principles announced by this Court and other federal courts in determining whether a particular trademark is or has become a generic term and also creates confusion regarding the proper interpretation of the Federal Trademark Act of 1946 (Lanham Act).³

This case presents a conflict involving fundamental principles of trademark law that must be authoritatively resolved by this Court in order to maintain a viable trademark system which is intended to, and does, protect important private and public interests. The basic purpose of our trademark system is to prevent public confusion or mistake as to the source of a product and to enable consumers to choose among competing products based upon past experience and quality expectations. It is essential that the legal rules underlying trademark protection, and

² *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 611 F.2d 296 (9th Cir. 1979); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316 (9th Cir. 1982).

³ 15 U.S.C. §§ 1051-1127 (1976 & Supp. V 1981).

particularly those governing whether a mark has become generic, uniformly further that policy objective.

The Ninth Circuit decision has the potential to impair significantly federal and common law trademark rights because it resolves the question of whether a trademark is generic on the basis of purchaser motivation rather than purchaser recognition of the mark as a valid source indicator. While this particular decision involves a trademark for a product made by only one manufacturer, the ramifications of the opinion affect all trademarks, including those for goods produced by more than one manufacturer.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT AND THIS AND OTHER FEDERAL COURTS

The Ninth Circuit decision is in fundamental conflict with decisions of other federal courts, including the Supreme Court. The test for determining whether a trademark has become the generic name for a product is critical and thus demands uniformity. Early in its opinion, the Ninth Circuit appeared to conform to the well-recognized legal principle that a trademark functions both to identify a product and its source.⁴ However, throughout the remainder of the opinion, the court failed to credit this dual function and in effect even equated the source-identifying function with purchaser knowledge of the actual identity of the producer. The requirement of such an identification puts the Ninth Circuit in direct conflict with this Court, other federal courts and with fundamental principles of trademark law.

A. The Ninth Circuit Decision Fails to Recognize the Dual Function of a Trademark

The Ninth Circuit held that a trademark is not generic if "the primary significance of the term in the minds of

⁴ 684 F.2d at 1321.

the consuming public is not the product but the producer" and "when a trademark primarily denotes a product, not the product's producer, the trademark is lost."⁵ However, the functions of product identification and source identification are not mutually exclusive. This Court in *Kellogg Co. v. National Biscuit Co.*⁶ recognized that a trademark may identify both a product and its source when it stated that the *primary* significance of the term must be as an indicator of source. The term "shredded wheat" was held to be generic because the evidence demonstrated that to the general public this term indicated a *type* of product (a pillow-shaped biscuit) and not a cereal from a particular source.⁷

Here, on the other hand, survey evidence indicated that 55 percent of the public associated the MONOPOLY board game with Parker Brothers by name, and 63 percent recognized MONOPOLY as a "brand name" for a particular product.⁸ Despite the direct bearing of this survey on the issue of the primary significance of MONOPOLY, the Ninth Circuit rejected the evidence as irrelevant.⁹

In *E.I. DuPont de Nemours and Co. v. Yoshida International, Inc.*,¹⁰ the District Court for the Eastern District of New York held that a survey of the same type rejected by the Ninth Circuit (the "Teflon" survey) is one which focuses on the "critical element" in a genericness case.¹¹ Such a survey poses the question which is the

⁵ 684 F.2d at 1319.

⁶ 305 U.S. 111 (1938).

⁷ 305 U.S. at 116-19. See *Bayer Co. v. United Drug Co.*, 272 F. 505, 509 (S.D.N.Y. 1921), wherein Judge Learned Hand asked "whether the buyers merely understood that the word 'Aspirin' meant this kind of drug, or whether it meant *that and more than that . . .*" (emphasis supplied).

⁸ 684 F.2d at 1321.

⁹ *Id.* at 1323.

¹⁰ 393 F. Supp. 502 (E.D.N.Y. 1975).

¹¹ *Id.* at 527.

ultimate issue in this case: is the term MONOPOLY perceived by consumers to be a "brand name" (i.e., trademark) or a "common name" for the product in question? ¹² Yet the Ninth Circuit, in rejecting the *DuPont* survey approach, stated that such a survey "had no relevance to the question in this case" because it said nothing about the *primary* meaning of MONOPOLY in the minds of consumers. ¹³ The court focused instead on the fact that the MONOPOLY board game is a single source product, stating "Monopoly" would have to be a 'brand name' because it is made by only one company." ¹⁴ This analysis completely ignores the public perception of MONOPOLY as evidenced by both petitioner's and respondent's surveys and substitutes instead the court's perception. The issue is whether the public understands that a product bearing a particular trademark originates from a single source. The fact that there is only one producer of a product, or even that the name of the producer is unknown to the public, does not alter the controlling legal test. So long as the public is aware of a single, albeit anonymous source, the trademark functions as intended and is valid. ¹⁵

B. The Ninth Circuit Decision is in Conflict With Other Circuits With Respect to the Relevance of Purchaser Motivation in Buying a Trademarked Product

As noted above, when the *primary* significance of a term in the mind of the public is source identification, that term functions as a trademark.

¹² As Judge Hand stated the issue in *Bayer Co.*, "What do the buyers understand by the word for whose use the parties are contending?" 272 F. at 509.

¹³ 684 F.2d at 1323.

¹⁴ *Id.*

¹⁵ *E.g.*, *Feathercombs, Inc. v. Solo Products Corp.*, 306 F.2d 251, 255 (2d Cir. 1962); *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D. N.Y. 1921); *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 1014 (C.C.P.A. 1979); J. McCarthy, *Trademarks and Unfair Competition*, Vol. I, § 3.3(B) (1973).

In order to determine the primary significance of the term MONOPOLY, the Ninth Circuit placed conclusive reliance on respondent's "motivation" survey showing that 65 percent of purchasers buy the MONOPOLY board game "primarily because I am interested in playing 'Monopoly'. I don't much care who makes it".¹⁶ According to the survey, all other respondents said that the reason for buying the game is primarily because "I like Parker Brothers' products."¹⁷ The heavy weight placed upon the "motivation" survey, to the exclusion of other survey evidence, effectively rejects the dual function of trademarks and relies upon factors which are totally irrelevant to the issue of genericness. Most, if not substantially all consumers recognize a trademark (or "brand name") as denoting a product of a particular company—even if the precise name of the company is not known. While consumers may buy a trademarked product without knowing or even caring who the manufacturer is, consumers still expect the product to have the same characteristics and quality as their last purchase of this particular "brand". The trademark, among other things, is the tangible symbol of that expectation. In looking primarily to the purchaser's motivation in buying the MONOPOLY board game, the Ninth Circuit ignored the primary significance which this term has to the public—to denote the single source of this particular game.

The Ninth Circuit emphasizes the fact that purchasers of the game involved in this case ask for it by the name MONOPOLY.¹⁸ However, this is a function of consumer use of trademarks and does not necessarily indicate whether the mark is *perceived* by consumers to be a brand name (trademark) or a generic term. In almost all product categories, consumers use trademarks to identify par-

¹⁶ 684 F.2d at 1324.

¹⁷ *Id.*

¹⁸ 684 F.2d at 1324-25.

ticular products, knowing, however, that the trademarks represent particular manufacturers.

The Ninth Circuit decision in effect demands that the consuming public recognize the names of the manufacturers of the products it buys. While this recognition may occur in many instances, trademark rights are not dependent upon such recognition. This point was skillfully made by Judge Nies of the Court of Customs and Patent Appeals¹⁹ in her concurring opinion in *In re DC Comics, Inc.*²⁰ In that opinion, Judge Nies clearly reasoned that a survey addressed to the motivation of purchasers, such as that relied upon by the Ninth Circuit, is legally immaterial to the issue of genericness. Motivation "is of concern to market researchers," but "[m]otivation does not change a descriptive term which has acquired distinctiveness or an arbitrary word, name, symbol or device into a generic designation."²¹ Due to the special competence of the Court of Customs and Patent Appeals in trademark matters, and the fundamental conflict between that court and the Ninth Circuit on this point, this critical issue should be reviewed by the Court.

C. The Ninth Circuit Did Not Apply the Appropriate Legal Standard of Review

Rule 52(a) of the Federal Rules of Civil Procedure states that a trial court's findings of fact "shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Nevertheless, the Ninth Circuit twice reversed the trial court's holding that the pri-

¹⁹ The United States Court of Customs and Patent Appeals and the United States Court of Claims were merged on October 1, 1982, resulting in The United States Court of Appeals for the Federal Circuit. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164 (April 2, 1982).

²⁰ — F.2d —, 215 U.S.P.Q. 394 (C.C.P.A. 1982).

²¹ *Id.* at 404.

mary significance of MONOPOLY is to indicate source. The trial court decisions were based upon a careful and thorough review of all the evidence presented by the parties, including survey evidence and testimony which demonstrated that the public's awareness of MONOPOLY as a "brand name", and in particular as the brand name of Parker Brothers, was the primary significance of the term. Although the specific identity of the source is legally irrelevant, even respondent's motivation survey indicated that nearly one out of three purchasers of the MONOPOLY board game bought it primarily because they like Parker Brothers products.²² It is difficult to imagine a trademark which is more readily identified with its producer than this one, except for those marks which are substantially similar to the trade names of their producers, such as COCA-COLA or KODAK. Yet the Ninth Circuit, acknowledging that there was evidence to support the trial court's findings,²³ twice substituted its own judgment for that of the district court. This is precisely the kind of appellate review that is prohibited both by Rule 52 and decisions of this Court.²⁴

II. THE NINTH CIRCUIT DECISION IS INCONSISTENT WITH THE POLICIES UNDERLYING TRADE-MARK LAW

The Federal Trademark Act of 1946 protects the rights of a trademark owner in a mark which identifies its goods and distinguishes them from those manufactured or sold by others.²⁵ Trademark laws also serve a critically important function in the protection of the interests of the

²² 684 F.2d at 1324.

²³ *Id.* at 1326.

²⁴ *Pullman-Standard v. Swint*, — U.S. —, 72 102 S.Ct. 1781 (1982); *Inwood Laboratories v. Ives Laboratories*, — U.S. —, 102 S.Ct. 2182 (1982).

²⁵ 15 U.S.C. § 1127 (1976) (the definition of a "trademark").

consuming public.²⁶ When a consumer buys a product bearing a particular trademark and is pleased with the quality or other characteristics of the product, it is the trademark which enables easy identification of the product for subsequent purchases. The trademark tells the consumer that the second and subsequent purchases of this particular product will emanate from the same original source (perhaps anonymous) as did the first purchase. By the same token, if the consumer is dissatisfied with the quality or features of a trademarked product, repurchases of that product may be readily avoided because the trademark identifies it as emanating from the same source as the original product.

Since this case involves a product which is produced by only one manufacturer, the public necessarily associates MONOPOLY with the particular qualities and characteristics of the Parker Brothers game.²⁷ However, whether or not the public can identify Parker Brothers by name as the source of the game is legally irrelevant to the determination of the primary significance of MONOPOLY, as are the consumer's motivations for purchasing the game. So long as consumers perceive MONOPOLY as a means of ensuring that every MONOPOLY game emanates from the same source, MONOPOLY functions as a valid trademark. Merely because one producer has exclusive rights in a particular product by virtue of copyright or patent protection, does not mean that the trademark for that product is any less legitimate or im-

²⁶ *Pepsico, Inc. v. Grapette Co.*, 416 F.2d 285, 289 (8th Cir. 1969) ("The consumer might buy a product thinking it to be of one quality of having certain characteristics and could find it only too late to be another."); *W.E. Bassett Co. v. Revlon, Inc.*, 354 F.2d 868, 871 (2d Cir. 1966) ("The purpose of the trademark laws is to protect the public from the confusion and deception which flows from the copying of marks which, through their distinctiveness or exclusivity of use, identify the origin of the marked products.").

²⁷ 684 F.2d at 1322.

portant.²⁸ Once petitioner's copyright protection expires, the identical product may be manufactured by another and sold under a trademark which is not confusingly similar to MONOPOLY. If the public at that point perceives both products as "monopoly games", the name might well be generic. On the other hand, if the public continues to recognize MONOPOLY as identifying the Parker Brothers game and distinguishing it from a competitor's version, MONOPOLY would continue to function as a valid trademark and be entitled to protection as such.

The effect of the Ninth Circuit decision is to hold MONOPOLY generic because consumers have not had an opportunity to compare the Parker Brothers game with a competitor's version. Because the court found no "interchangeable goods" which a consumer may substitute for the MONOPOLY game, it found that the MONOPOLY game constitutes a genus of products and that MONOPOLY is the generic name for the genus.²⁹ Such reasoning is circular and could be used to invalidate most, if not all, trademarks for single source products.

One of the major purposes of contemporary advertising is to persuade the consumer that there is no substitute for the advertised product because of its unique or superior qualities as compared to other products. Under the Ninth Circuit analysis, almost any product having such qualities can be characterized as constituting its own genus. Such

²⁸ See *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 195 (9th Cir. 1953); *President Suspender Co. v. Mac-William*, 238 F. 159, 163 (2d Cir. 1916), *cert. denied*, 243 U.S. 636 (1917) ("There is no presumption of law, without proof of the fact . . . that a name used on a patent article passes to the public on the expiration of the patent. . ."); *Chas. Pfizer & Co. v. Generic Formulae, Inc.*, 275 F. Supp. 421, 423 (E.D.N.Y. 1967); *Marks v. Polaroid Corp.*, 129 F. Supp. 243, 270-71 (D. Mass. 1955), *aff'd*, 237 F.2d 428 (1st Cir. 1956), *cert. denied*, 352 U.S. 1005 (1957).

²⁹ 611 F.2d at 305-06.

a result was contemplated by Judge Nies in *In re DC Comics, Inc.*:³⁰

The application of the truism [that a trademark functions to indicate the source of goods, not the goods themselves] depends upon how the public perceives and uses the asserted mark, as well as upon accepted business practices. It becomes sophistry if the generic nature of a word or name depends on how broadly or narrowly the board, or a court, defines a "kind" or "class" of goods. Competing products in our economy need not be precisely identical. Competitive products are commonly promoted on the basis of their differences, the better brightener in a toothpaste or detergent, the more effective relief of an analgesic, antihistamine, or eye wash, the more alluring fragrance of a particular perfume, the appealing design of particular tableware, automobiles or jeans, the greater durability of a particular maker's washing machine, the greater excitement of playing a particular game, the long-lasting quality of a particular make-up, the unique flavor of a brand of chicken, beer, soup, pie or pizza, the better results of a particular weight control program or speed reading course, the sound of a particular musical group. Under the PTO [Patent and Trademark Office] view, each of these products and services could be deemed a "kind" or "class," and the particular means by which the public identifies it would be condemned as a generic designation regardless of its useful function to the public. Trademark protection would then be limited to house marks and to marks for fungible goods and would be eliminated for trademarks (whether name or design) applied to single products available only from single producers.

Similarly, the motivation survey relied upon by the Ninth Circuit undermines another basic policy objective of trademark law—protection of the public's ability to distinguish between products. Whether a consumer buys

³⁰ 215 U.S.P.Q. 394, 404 (C.C.P.A. 1982).

a game because he likes to play it, because he likes the manufacturer, or because he likes the color of the box in no way indicates whether the consumer relied upon a trademark to distinguish that game from others.

III. THE NINTH CIRCUIT DECISION WILL HAVE A WIDESPREAD NEGATIVE IMPACT ON MANUFACTURERS OF ALL KINDS

Although this case arises in the context of a unique board game produced by only one manufacture, the Ninth Circuit opinion casts serious doubts on the validity of a substantial number of trademarks for all types of products. Since the court indicates that Procter and Gamble "might have cause for alarm" about the validity of the trademark TIDE,³¹ it appears that the Ninth Circuit would not find it difficult to create an artificial genus composed solely of one particular brand of laundry detergent.

If this decision is allowed to stand, the result will be to jeopardize the many years and millions of dollars spent in creating and developing brand recognition, loyalty and goodwill, all symbolized by the trademarks of the products' manufacturers. The consumer will no longer be able to differentiate among the products of various manufacturers because each will be free to use the other's "generic" trademarks. There will be no incentive for a manufacturer to strive for high quality standards because consumers will be unable to use trademarks as a means of making or avoiding subsequent purchases of particular products. Trademark owners will be faced with endless litigation challenging the validity of their trademarks simply because a particular "motivation" survey indicates that some unknown percentage of the public fails to identify the manufacturer.

The Ninth Circuit opinion accordingly is inconsistent with federal trademark law, other federal court opinions and important public policy objectives.

³¹ 684 F.2d at 1326.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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